

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SUBREGION 34**

**ELM HILL NURSING CENTER, INC.
D/B/A APPLE REHAB - ROCKY HILL**

Employer

and

**NEW ENGLAND HEALTHCARE EMPLOYEES
UNION, DISTRICT 1199, SEIU**

Petitioner

Case 01-RC-260957

DECISION AND DIRECTION OF ELECTION¹

Elm Hill Nursing Center, Inc. D/B/A Apple Rehab - Rocky Hill (the Employer) is engaged in the business of operating a nursing home. New England Healthcare Employees Union, District 1199, SEIU (the Petitioner) seeks to represent a bargaining unit of all full time, regular part time, and per diem licensed practical nurses, but excluding all other employees, professional employees, guards and supervisors, as defined in the Act. The parties stipulate, and I agree, that the appropriate eligibility formula for part time and per diem nurses is that which is set forth in *Davison-Paxon Co.*, 185 NLRB 21, 24 (1970). To be eligible to vote under this formula, employees must work an average of four or more hours per week in the 13 weeks preceding the election eligibility date.

The Petitioner presently represents a separate unit of employees employed at the Employer's Rocky Hill facility.

The sole matter in contention is whether to conduct a manual or mail ballot election.

The Petitioner argues that a mail ballot election is the only safe and fair method by which the election can be conducted during the COVID-19 pandemic, particularly as nursing homes have been "hot spots" during the pandemic with high rates of infection among both residents and employees. The Petitioner notes that any voter may be subject to mandatory or voluntary quarantine on the date of a manual election and thus be prevented from casting a ballot.

¹ The petition in this case was filed under Section 9(c) of the Act. The parties were provided opportunity to present evidence on the issues raised by the petition at a hearing held before a hearing officer of the National Labor Relations Board (the Board). I have the authority to hear and decide this matter on behalf of the Board under Section 3(b) of the Act. I find that the hearing officer's rulings are free from prejudicial error and are affirmed; that the Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction; that the Petitioner is a labor organization within the meaning of the Act; and that a question affecting commerce exists concerning the representation of certain employees of the Employer.

The Employer argues that a mail ballot election is inappropriate because COVID-19 restrictions are presently loosening within the State of Connecticut and employees are working their regular schedules. The Employer proposes holding the election outside and providing mail ballots to any employees who have tested positive for COVID-19.

Facts

Federal, state, and local governments have issued multiple directives urging individuals to avoid unnecessary travel and to refrain from gathering in large groups during the present pandemic. The infection and death rates in Connecticut have slowed in recent weeks and Governor Ned Lamont has announced that phase 2 of Connecticut's reopening plans will begin on Wednesday, June 17. As the Employer operates a nursing home, it is not directly subject to phase 2, which primarily affects businesses such as hotels, restaurants, and libraries.

On March 9, 2020, the State of Connecticut Department of Public Health directed nursing homes to impose restrictions on all visitors except when a current health state (e.g. end-of-life care) is in question. However, on June 15, 2020, the Connecticut DPH updated its COVID-19 Infection Control and Testing Guidance for Nursing Homes. These guidelines state that residents who have tested negative may be permitted to have outdoor visits given that safety procedures including masks and physical distancing are adhered to. The Employer has not yet met the criteria to allow for these outdoor visits. The Employer adheres to all DPH guidelines and does not allow anyone who presents with a fever or other symptoms of illness to enter its premises.

Currently, the Employer has 110 beds in operation. Ninety-six residents have tested positive for COVID-19. While 50 of these cases have been resolved, at least 21 residents have died of COVID-19 in the past three months. The parties noted during the hearing that the latest resident death from COVID-19 at the facility is so recent that it is not included in published statistics.

Approximately four of the eighteen members of the proposed bargaining unit have tested positive for COVID-19. They have since tested negative or been asymptomatic for a period of time, although two of the potential voters tested positive, then tested negative, then tested positive again. The Petitioner notes that over fifty percent of the Employer's employees in its existing bargaining unit have tested positive or been required to enter quarantine due to exposure to COVID-19.

Analysis

Although there is a preference for conducting manual elections in ordinary circumstances, *San Diego Gas and Electric*, 325 NLRB 1143 (1998), allows a Regional Director to exercise discretion and order a mail-ballot election in extraordinary circumstances. Recently, in *Atlas Pacific Engineering Company*, 27-RC-258742 (May 8, 2020), the Board, in denying the

employer's request for review, stated that the COVID-19 pandemic constitutes extraordinary circumstances warranting a mail ballot where federal, state, and local government directives have limited nonessential travel, required the closure of nonessential businesses, and resulted in a determination that the regional office charged with conducting the election should remain on mandatory telework.

The Employer's argument that the COVID-19 pandemic no longer constitutes an extraordinary circumstance because some nonessential businesses have begun to reopen in the State of Connecticut is not persuasive. Indeed, residents at the Employer's facility continue to succumb to the disease with such regularity that published statistics were not up-to-date at the time of the hearing. Non-medical personnel are generally not permitted to enter the Employer's facility, hence the Employer's suggestion that the election be held outdoors.

Although many employees will undoubtedly be working their usual schedules on any given day, other employees are likely to be placed at the mercy of their own illnesses. Multiple members of the proposed bargaining unit have already tested positive for COVID-19 and been required to isolate themselves for the safety of their families, their colleagues, their patients, and members of the public. Approximately 21 residents of the Employer's facility have died of COVID-19, and the latest available statistics suggest that approximately 96 residents of the facility have tested positive at some point within the last three months. Despite precautions and protective equipment, the caregivers who comprise the proposed unit may contract the disease with which they are in constant contact at any given time.

Because COVID-19 continues to be widespread at the Employer's facility, the safety of all involved cannot be guaranteed during a manual election. Many of those infected with COVID-19 are not symptomatic and unknowingly pass their infection to those with whom they interact. The Employer's proposal that the election be held outdoors, and mail ballots sent to voters who are quarantined on the day of the election, is impractical. An outdoor election is by definition vulnerable to the whims of the elements; there is no way to guarantee that the chosen election date will be free of severe winds and thunderstorms which could dissuade voters from participating and soak the paper ballots and cardboard ballot box. Those infected with COVID-19 often test positive unexpectedly after multiple negative tests. If a voter receives positive test results on the day before the election, there will be insufficient time to prepare a mail ballot and that voter will be disenfranchised. As the Board does not permit absentee ballots, mail ballots cannot be sent to employees who were unable to attend a manual election in any event. If a Board agent arrives to run the election and unexpectedly shows signs of illness, the Employer will be prohibited from permitting the Board agent onto the premises and the election will need to be postponed at the last possible moment.

On the other hand, a mail ballot election has no apparent significant drawbacks. Indeed, the Employer has not raised any specific concerns about ways in which a mail ballot election may disenfranchise or endanger voters.

Given the extant conditions, the Region's use of mail balloting has a strong comparative advantage in avoiding negative effects on employees' ability to fairly and fully express their desires on the question of representation.

I conclude that, under these circumstances, a mail ballot election is appropriate because it will protect the health and safety of voters, Agency personnel, the parties' representatives, and the public during the current health crisis.

Conclusion

Based on the discussion above, I find, that the following bargaining unit is appropriate under the Act:

All full time, regular part time and per diem licensed practical nurses² employed by the Employer, but excluding any employee currently represented by a labor organization, office clerical employees, and guards, and professional employees and supervisors as defined in the Act.

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by New England Healthcare Employees Union District 1199, SEIU.

A. Election Details

The election will be conducted by United States mail. The mail ballots will be mailed to employees employed in the appropriate collective-bargaining unit. On Monday, June 22, 2020, ballots will be mailed to voters by National Labor Relations Board, Subregion 34. Voters must sign the outside of the envelope in which the ballot is returned. Any ballot received in an envelope that is not signed will be automatically void.

Voters must return their mail ballots so that they will be received in the National Labor Relations Board, Subregion 34 office by close of business on Friday, July 10, 2020.

Those employees who believe that they are eligible to vote and did not receive a ballot in the mail by Wednesday, July 1, 2020, should communicate immediately with the National Labor Relations Board by either calling the Subregion 34 Office at (860) 240-3522 or our national toll-free line at 1-844-762-NLRB (1-844-762-6572).

Due to the extraordinary circumstances of COVID-19 and the directions of state or local authorities including but not limited to Shelter in Place orders, travel restrictions, social

² Any per diem licensed practical nurse who worked an average of 4 hours per week in the 13 weeks prior to June 13, 2020 will be eligible to vote.

distancing and limits on the size of gatherings of individuals, I further direct that the ballot count will take place virtually, on a platform (such as Skype, WebEx, etc.) to be determined by the Regional Director, at 11:00 am on Tuesday, July 14, 2020. Each party will be allowed to have one observer attend the virtual ballot count.

B. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.

Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Also eligible to vote using the Board's challenged ballot procedure are those individuals employed in the classifications whose eligibility remains unresolved as specified above and in the Notice of Election.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

C. Voter List

As required by Section 102.67(1) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters.

To be timely filed and served, the list must be *received* by the regional director and the parties by Wednesday, June 17, 2020. The list must be accompanied by a certificate of service showing service on all parties. **The region will no longer serve the voter list.**

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the

list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015.

When feasible, the list shall be filed electronically with the Region and served electronically on the other parties named in this decision. The list may be electronically filed with the Region by using the E-filing system on the Agency's website at www.nlr.gov. Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

D. Posting of Notices of Election

Notices of Election will be electronically transmitted to the parties, if feasible, or by overnight mail if not feasible. Section 102.67(k) of the Board's Rules and Regulations requires the Employer to timely post copies of the Board's official Notice of Election in conspicuous places, including all places where notices to employees in the unit are customarily posted. You must also distribute the Notice of Election electronically to any employees in the unit with whom you customarily communicate electronically. In this case, the notices must be posted and distributed no later than 12:01 a.m. on Wednesday, June 17, 2020. If the Employer does not receive copies of the notice with this decision, it should notify the Regional Office immediately. Pursuant to Section 102.67(k), a failure to post or distribute the notice precludes an employer from filing objections based on nonposting of the election notice.

To make it administratively possible to have election notices and ballots in a language other than English, please notify the Board agent immediately if that is necessary for this election. Also, if special accommodations are required for any voters, potential voters, or election participants to vote or reach the voting area, please tell the Board agent as soon as possible.

Please be advised that in a mail ballot election, the election begins when the mail ballots are deposited by the Region in the mail.

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RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 14 days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlr.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board.

Dated: June 15, 2020

Paul J. Murphy, Acting Regional Director
National Labor Relations Board
Region 01, By



Michael C. Cass, Officer-In-Charge
National Labor Relations Board
Subregion 34

Attachment